Office-Supreme Court, U.S.
FILED
NOV 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-325

In The

Supreme Court of the United States

October Term, 1983

CITY OF EVANSTON,

Petitioner,

MARY CLARE HENDERSHOT, et al.,

Petitioner-Intervenors,

vs.

LUBAVITCH CHABAD HOUSE OF ILLINOIS, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This matter arises out of a Complaint for Declaratory Judgment filed by Respondents in the Circuit Court of Cook County, Illinois, seeking a declaration that they were entitled to the issuance of a special use permit for the operation of a "church" under the zoning ordinances of the Petitioner, City of Evanston. The Amended Complaint was framed in two counts, the first count of which

alleged that the City's denial of a special use permit was contrary to and inconsistent with the standards set forth in the City's zoning ordinance, and the second count of which alleged that the denial of the special use permit constituted an impediment to the practice of the Orthodox Jewish faith as practiced by members of the Respondents' organization and its followers in violation of their federal and Illinois constitutional rights.

The City filed an Answer denying Respondents' allegations, and further affirmatively alleged that: any hardship to Respondents was self created; the proposed use was not a church under the City's zoning ordinance; and that the City's action was a valid exercise of its police power.

After hearing testimony and evidence for over eight (8) months on an intermittent basis, on March 3, 1981, the Circuit Court of Cook County, Illinois entered a judgment order finding for Respondents on both counts of their Amended Complaint and holding that Respondents could operate a church (synagogue) for the purposes of: rabbinical counseling; discussion groups; religious worship services; and for other purposes attendant to a church. The trial court's order specifically found that Respondents' proposed use had met all of the standards for the issuance of a special use permit which were established by the ordinances of the Petitioner, City of Evanston. Said judgment order also imposed certain restrictions on Respondents as conditions to the issuance of the special use permit, to wit: attendance at religious services and discussion groups were to be limited to a maximum of thirty (30) persons, or such lesser number as may be required by

fire, safety or building code restrictions; a portion of the premises may be occupied as a single family residence for an individual caretaker or caretaker family; the premises must comply with all building code requirements of the City of Evanston; and the special use permit would only apply to the Respondent organization and any successors with the same or similar activities.

Petitioners appealed from the aforesaid judgment order to the Appellate Court of Illinois, First District, which affirmed, holding that the trial court's finding, that Respondents met all of the requirements for the issuance of a special use permit as set forth in the zoning ordinance of the City of Evanston, was not against the manifest weight of the evidence, and as such the judgment order was proper and should not be disturbed. The Appellate Court of Illinois also found that the location of churches and other religious sanctuaries can be regulated by zoning ordinances in proper cases, but that in view of the fact that the proposed use met all of the requirements for the issuance of a special use permit as set forth in the City's ordinance, the improper denial of Respondents' application for a special use permit also constituted an infringement of Respondents' constitutional right to freedom of religion.

Petitioners petitioned the Illinois Supreme Court for leave to appeal from the decision of the Appellate Court of Illinois, which petition was denied.

REASONS FOR DENYING THE WRIT

A. The decision of the Appellate Court of Illinois which the Illinois Supreme Court declined to review presents no constitutional issue.

Petitioner argues that "the writ should be granted in this case because the decision of the Illinois Appellate Court is clearly in conflict with this Court's implicit holding that a zoning ordinance which prevents the construction of a religious use does not violate the First Amendment." (Pet. for Writ of Cert. p. 7) Petitioner contends that the opinion of the Illinois Appellate Court is contrary to the proposition that religious institutions are subject to zoning ordinances. Petitioner submits that if the decision of the Appellate Court in the instant case were permitted to stand, it would place religious institutions beyond the reach of reasonable zoning ordinances. (Pet. for Writ of Cert. p. 8).

Even the most cursory reading of the Illinois Appellate Court opinion demonstrates that the Illinois court clearly recognized the right of the City of Evanston to reasonably regulate Respondents' proposed use under its zoning ordinances. As stated by the Illinois Appellate Court:

> "Of course, the location of churches and other religious sanctuaries can be regulated by zoning ordinances in proper cases. (See *South Side of God Church v. Zoning Board of Appeals* (1977), 47 Ill. App. 3d 723, 365 N. E. 2d 118; *Coston Chapel A.M.E. Church v. Chaddick* (1972), 9 Ill. App. 3d 321, 292 N. E. 2d 215; *St. James Temple of the A. O. H. Church of God, Inc. v. Board of Appeals* (1968), 100 Ill. App. 2d 302, 241 N. E. 2d 525.) However, in determining

> whether this is a proper case for such a restriction, we must take into account that the right of freedom of religion, and other first amendment freedoms, rise above mere property rights. In addition, first amendment rights and freedoms far outweigh considerations of public inconvenience, annoyance or unrest. *Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals* (1962), 25 Ill. 2d 65, 71, 182 N. E. 2d 722, 725, citing *Terminiello v. Chicago* (1949), 337 U. S. 1, 4, 93 L. Ed. 1131, 1134, 69 S. Ct. 894, 296."

Lubavitch Chabad House of Illinois, Inc. v. City of Evanston, 112 Ill. App. 3d 233, 445 N. E. 2d at pp. 346-347.

Furthermore, the Illinois Appellate Court, rather than finding, as suggested by Petitioners, that Respondents' proposed use as a religious institution was immune from municipal regulation, was in agreement with the Zoning Board of Appeals of the City of Evanston and the trial court that the Respondents had met all of the requirements for the issuance of a special use permit as set forth in Petitioners' very own ordinance. As stated by the Illinois Appellate Court at 445 N. E. 2d at p. 347:

> "Under the circumstances, we conclude that the trial court's finding that plaintiff met 'all of the requirements for the issuance of a special use permit as set forth in the Zoning Ordinance of the City of Evanston' is not against the manifest weight of the evidence, and that the finding was proper and should not be disturbed".

The Illinois Appellate Court did conclude that, inasmuch as Respondents satisfied all of the criteria for the issuance of the special use permit established by the City in its ordinances, the impact of Petitioners' unjustified refusal to grant Respondents' petition for a special use permit resulted in preventing Respondents from freely practicing their religion at the particular location in ques-

tion. In so holding, the Illinois Appellate Court rejected Petitioner's urging that the court should disregard the fact that the right which Petitioners sought to restrict was the right of free exercise of religion. This Court's decision in the case of *Schad v. Borough of Mount Ephraim* (1981), 452 U.S. 61, 68 L.Ed. 2d 671, 680, 101 S.Ct. 2176, 2182 clearly supports the conclusion of the Illinois Appellate Court in holding, that although the power of local governments to zone and control land use is undoubtedly broad, and its proper exercise is an essential aspect of achieving a satisfactory quality of life, the zoning power is not infinite and is subject to judicial review. As stated by this Court:

> "... as is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed. Thomas v. Collins, 323 U.S. 516, 529-530, 89 L.Ed. 430, 65 S.Ct. 315 (1945)." *Schad supra* at page 680.

The Illinois Appellate Court's opinion is in further conformity with the decisions of this Court that the reasonableness and scope of municipal regulation are the important factors which must be considered when a zoning ordinance is sought to be applied to restrict First Amendments rights, and particularly the right of freedom of religion which occupies the highest among First Amendment values. *Sherbert v. Verner,* 374 U.S. 398 (1963); *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Thomas C. Collins,* 323 U.S. 516 (1945); *Village of Schaumburg v. Citizens For Better Environment,* 444 U.S. 620, 637, 63 L.Ed. 2d 73, 100 S.Ct. 826 (1980); See also *Pfeffer,* "The Supremacy For Free Exercise" 61 Georgetown, L. Rev. 1115 (1973).

B. This Court will not entertain appeals from state court decisions which rest on adequate and independent grounds.

The law is well-settled that this Court will not entertain appeals from state court decisions which rest on adequate and independent state grounds.

> "This Court from the time of its foundation has adhered to principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis,* 20 Wall. (U. S.) 590, 636, 22 L. Ed. 429, 444; *Berea College v. Kentucky,* 211 U. S. 45, 53, 53 L. Ed. 81, 85, 29 S. Ct. 33; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.,* 243 U. S. 157, 164, 61 L. Ed. 644, 648, 37 S. Ct. 318; *Fox Film Corp. v. Muller,* 296 U. S. 207, 80 L. Ed. 158, 56 S. Ct. 183. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the State and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over State judgments is to correct them to the extent that they incorrectly adjudge federal rights."

Herb v. Pitcairn, 324 U. S. 117, 125-126 (1944).

As a general rule, this Court will accept as controlling the decisions of the state courts upon questions of local law, both statutory and common. *American Railway, Exp. Co. v. Kentucky,* 273 U. S. 269, 272 (1926).

Even assuming *arguendo* that the decision of the Illinois Appellate Court, which the Illinois Supreme Court declined to review, constituted an erroneous interpretation of the First Amendment issues raised in the second count of Respondents' Amended Complaint, review by this Court would still not be justified. Before this Court will review the decision of a state court, it must affirmatively

appear from the record that whatever federal question is involved was necessary to the determination of the case by the state court. Where a decision of a state court might have been either on a state or federal ground, and the state ground is sufficient to sustain the judgment, this Court will not undertake to review it. *Durley v. Mayo,* 351 U. S. 277, 281 (1955).

Consequently, the finding of the Illinois Appellate Court, affirming the trial court's finding that Respondents met all of the requirements for the issuance of a special use permit as set forth in the zoning ordinance of the City of Evanston, clearly constitutes an independent basis under Illinois law, absent any federal constitutional issue, supporting the position of Respondents in a land use zoning case involving the interpretation of the statutory requirements of the City's local zoning ordinance. The City's own Zoning Board of Appeals, the trial court, and the Illinois Appellate and Supreme Courts held that the City's zoning ordinances were indeed applicable to Respondents, and that Respondents' proposed use fully complied with the standards of said ordinances.

CONCLUSION

The Zoning Board of Appeals of the Petitioner, City of Evanston, the Circuit Court of Cook County, Illinois, the Illinois Appellate Court, and the Supreme Court of Illinois have found that Respondents have met all of the standards set forth in Petitioners' zoning ordinance for the issuance of a special use permit to operate a "church", subject to certain use restrictions imposed by the trial

court in its judgment order. Such a finding presents no constitutional issue for this Court's review. The Petition for Writ of Certiorari should be accordingly denied.

Respectfully submitted,

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